U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 June 2004

CASE NO.: 2004-TLC-8

In the Matter of:

DOMAINE DROUHIN OREGON,
Employer

Appearances: Leisha Vatnsdal
For the Employer

R. Peter Nessen, Esquire
For the Employment & Training Administration

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DENYING H-2A APPLICATION

INTRODUCTION

This matter arises under the Temporary Labor Certification provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) ("INA") and the implementing regulations found at 20 C.F.R. Part 655, Subparts B and C. This Decision and Order is based on the written record,[1] which includes the initial appeal by the Employer's agent, the certified record from Employment & Training Administration Office of the Department of Labor ("ETA"), and letter briefs filed by representatives for the Employer and the ETA.

ANALYSIS AND FINDINGS

Background

The INA allows agricultural employers to hire temporary, non-immigrant foreign workers under H-2A visas. Employers wishing to hire such workers must meet certain requirements and apply to the ETA for a labor certification. The employer must also submit a copy of its request to the local office of the state employment service agency that serves the area of the intended employment. 20 C.F.R. § 655.100.

[1] During a telephone conference held on June 2, 2004, with representatives for both parties, the Employer's representative confirmed that the Employer wanted a hearing based on the record. It was agreed that the parties would be given an opportunity to submit letter briefs in support of their respective positions.

On April 15, 2004, the Employer, Domaine Drouhin Oregon, filled out an Application for Alien Employment Certification which it filed with the Region 6 Regional Administrator for the ETA and also sent to the Oregon Employment Department. The Employer sought to fill one position as a "farm machine operator" with a non-immigrant alien worker from New Zealand. The Employer included the following description of the job duties:

> tends machines such as crusher and stemmer that separates crop from waste materials of grass, leaves, rocks and twigs. Turns switches to activate conveyors, blowers and shakers. Adjusts machinery to obtain optimum separations. Loads conveyors, hoppers and wheels to feed machines. Positions boxes at discharge end of conveyors to catch products. Moves baffle lever that channels product flow to container or stops flow during exchanges. Observes machine operation to detect malfunctions and adjusts machine, lubricates parts and replaces pieces to improve performance. Pulls debris or overloads to prevent clogging. May mix and pour chemicals in treating tanks. Transports materials.

(Certified Record,[2]- p. 19.)

On or about April 23, 2004, the Employer was notified by William Sanderlin of the Oregon Employment Department that because it appeared that the majority of the work to be performed by the foreign worker would be in the winery instead of the vineyard, the H-2A provisions might not apply. Mr. Sanderlin also identified numerous other deficiencies in the application and asked the Employer to provide the responses about the identified deficiencies to the H-2A Manager for the San Francisco Office of the U.S. Department of Labor. (Certified Record, pp. 17-8.)

On April 26, 2004, the Employer's agent responded and stated that the majority of the work would be performed in the winery and that the job involved the processing of the grapes once they have been harvested in the vineyard. She also stated that the processing takes place within the winery. (Certified Record, p. 16.) On the same day, Mr. Sanderlin notified Mark Lambert and Dave Munson of the U.S. Department of Labor of the deficiencies that it had identified to the Employer. (Certified Record, p. 15.)

On April 30, 2004, Martin Rios, the Certifying Officer for the Department of Labor, notified the Employer that the application had been denied because the farm machine operator position did not qualify for the H-2A program and suggested that the application be withdrawn and that an application be submitted under the H-2B program instead. (Certified Record, pp. 10-12.) The Employer did not withdraw the application and submit a modified application. Instead, on May 3, 2004, the Employer's agent responded that the position should be listed as a "farm machine tender" and that it was her understanding that if the job was located on the vineyard/winery grounds and processing and growing are taking place on the same property, an H-2A application could be submitted. (Certified Record, p. 9.)

On May 20, 2004, Mr. Rios issued a decision informing the Employer that the position did not qualify for the H-2A program and denying the application. (Certified Record, p. 2.) On

[2] References to the Certified Record are to the certified record provided to the Office of Administrative Law Judges by the ETA.

May 21, 2004,[3] the Employer asked that this decision be reviewed by the Office of Administrative Law Judges. (Certified Record, p. 1.)

Issue

The sole issue in this case is whether or not the "farm machine operator" or "farm machine tender" position is an agricultural position that is covered by the H-2A program.

Discussion

As mentioned earlier, the H-2A program allows employers to bring temporary non-immigrant agricultural workers into the United States to perform work that the employers cannot fill with United States workers. It applies only to agricultural workers.

The Department of Labor's implementing regulation at 20 C.F.R. § 655.100(c)(1) states that for the purposes of the H-2A program, agricultural labor or service is either "agricultural labor" as defined by section 3121(g) of the Internal Revenue Code of 1954 ("IRS Code"), 26 U.S.C. § 3121(g), or "agriculture" as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 203(f). The IRS Code definition is incorporated into the Department of Labor regulations at 20 C.F.R. § 655.100(c)(1)(i).

The regulation at 20 C.F.R. § 655.100(c)(1)(i), which is a restatement of the 26 U.S.C. § 3121(g), identifies four types of agricultural labor. They include work:

> (1) on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;
>
> (2) services performed in the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of the farm and its tools and equipment;
>
> (3) performed in connection with the production or harvesting of any commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. § 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes; and
>
> (4) handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity.

The Employer argues that the farm machine operator position falls under definitions 3 and 4. The Employer argues that separating the crop from waste materials constitutes "services performed in connection with the production or harvesting" of the commodity under definition 3;

[3] The letter is incorrectly dated "March 21, 2004."

that "loading conveys, hoppers, and wheels to feed machines" constitutes "services performed in the employ of the operator of a farm in packaging, processing, and storing of the commodity" under definition 4 and that "injecting chemicals to treat tanks" constitutes "services performed in the employ of the operator of a farm in storing of the commodity" under definition 4. I disagree.

With respect to definition 3, while grapes are being handled and processed when the grass, leaves, rocks and twigs are being separated out, the commodity in question is the wine that will ultimately be produced. As acknowledged by the Employer, the tasks being performed are preliminary to the making of the wine. These steps are more akin to the wine-making process than the harvesting and storage of the grapes. The grapes are not being separated from the waste so that they can be stored or sold as grapes, but rather so that they can be further processed into wine.

With respect to definition 4, it is even clearer that the duties do not fall under that definition of agricultural labor. That definition specifically refers to the steps and tasks involved in delivering the agricultural commodity in its "unmanufactured" state "to storage or to market or to a carrier for transportation to market." The inclusion of the words "unmanufactured state" makes it even clearer that the tasks at issue here, which are preliminary to converting an agricultural product from its "unmanufactured" state into a "manufactured" state, such as wine, do not come under the definition of agricultural labor. The grapes are not being loaded into hoppers and wheels to be fed into machines so that they can be stored. They are not being stored, and the task description in the Employer's application does not mention storage. They are going to be processed into wine. Similarly, "injecting chemicals to treat the tanks" in this instance is not part of the storage function. There was no storage function. The reality is that the tasks are the preliminary steps in converting the grapes to wine.

Thus, I find the farm machine operator position does not fall under any of these types of agricultural labor under the IRS Code.

"Agriculture" is defined in §3(f) of the FLSA as:

> farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f).

The farm machine operator position duties also do not fall within the FLSA definition of "agriculture." As the Department of Labor pointed out in its letter brief, 29 C.F.R. § 780.117(a) explains that the word "production" as used in 29 U.S.C. § 203(f) of the FLSA does not include operations involved in the processing of an agricultural product, such as making cider from apples, milling wheat into flour or the grinding and processing of sugarcane. Additionally, the 3rd Circuit Court of Appeals has also stated that "agriculture" work does not include the

processing of agricultural products. *Donovan v. Frezzo Brothers*, 678 F.2d 1166, 1170 (3rd Cir. 1982).

The Employer argues that the step that involves removing stems, twigs, etc from the grapes constitutes "preparation for market" and that reducing the grapes to a more readily storable pulp form constitutes "delivery to storage." Removing the stems, twigs, etc from the grapes would constitute "preparation for market" and come under the definition of "agriculture" if that was where the process stopped. However, these grapes are not being prepared for the "market" as grapes. They're being prepared to be crushed and processed into wine. Similarly, the reduction of the grapes to "a more readily storable pulp form" would constitute "delivery to storage" if the grapes were in fact stored in that form. The grapes are not delivered into storage. They are being delivered into the next step of the longer wine-making process. 29 C.F.R. § 780.117(a) says that "production," when used in conjunction with cultivation, growing and harvesting, refers to what is derived and produced from the soil, such as any farm produce. The tasks to be performed by the farm machine operator are not yielding farm produce. They yield a product processed from farm produce.

I also note that the farm machine operator "tends machines," "turns switches to activate conveyers, blower and shakers," "adjusts machinery," "moves baffle level," "adjusts machine," "lubricates parts and replaces pieces," "mixes and pours chemicals," and "transports materials." All these tasks are performed as part of a process which will ultimately process the grapes into wine. This is not an agricultural position.

ORDER

Accordingly, the Employment & Training Administration's decision denying of the Employer's H-2A application is AFFIRMED.

A

JENNIFER GEE
Administrative Law Judge